

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
FIRST LOOK INSTITUTE, INC., et al., : Docket #1:21-cv-07052-
 : BCM
Plaintiffs, :
- against - :
U.S. IMMIGRATION AND CUSTOMS : New York, New York
ENFORCEMENT, : December 7, 2021
 :
Defendant. : STATUS CONFERENCE
----- :

PROCEEDINGS BEFORE
THE HONORABLE BARBARA C. MOSES,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

THE COURT OFFICER: First Look Institute, Inc. et al versus U.S. Immigration and Customs Enforcement, Docket Number 21-civ-7052.

Counsel, please state your appearance for the record.

MS. DEBRA L. GREENBERGER: Debra Greenberger, Emery Celli Brinckerhoff Abady Ward & Maazel, for the plaintiffs. Good morning, your Honor.

HONORABLE BARBARA C. MOSES (THE COURT): Good morning, Ms. Greenberger. You may both be seated.

MS. ALLISON ROVNER: Good morning. AUSA Allison Rovner for defendants.

THE COURT: Good morning, Ms. Rovner.

Do we also have an attorney on the phone?

MS. VICTORIA J. NOBLE: Yes. This is Victoria Noble for First Look Institute and Travis Mannon.

THE COURT: Good morning, Ms. Noble. So I think that's everybody; Ms. Noble and Ms. Greenberger for the plaintiff, and Ms. Rovner for the government.

Before we get to the question of the timing of the production of the 59-minute video, let me ask a couple of background questions to that I better understand the case. Ms. Greenberger, do I understand properly that the original FOIA request was made, I guess, one year and 11 months ago

1
2 now, January of 2020; is that correct?

3 MS. GREENBERGER: That is correct, although we're
4 in December, your Honor, so a little more than 11 months;
5 but, yes, nearly two years ago.

6 THE COURT: Well, it's not December 14th yet.

7 MS. GREENBERGER: Fair enough.

8 THE COURT: All right, so almost two years. And
9 after first saying that they had not found any responsive
10 records, ICE ultimately found a single 59-minute video.
11 Your joint letter dated October 19th suggests that there
12 are or that there may be two additional videos. What makes
13 you say that?

14 MS. GREENBERGER: There was some evidence in the
15 underlying proceedings that happened in Texas that there
16 was multiple videos. But I don't know any more about that;
17 ICE has only told us about one video.

18 THE COURT: Well, expand on that a little bit, if
19 you would. What were the underlying proceedings in Texas?

20 MS. GREENBERGER: Can I actually defer to
21 Ms. Noble on that?

22 THE COURT: Ms. Noble, go ahead.

23 MS. NOBLE: Thank you.

24 The underlying procedures were a court, emergency
25 court hearing to authorize ICE to continue feeding

1 Mr. Kumar. There was (indiscernible) of testimony
2 Mr. Kumar gave and also from his doctors that discussed two
3 failed attempts to insert a nasogastric tube and then one
4 successful attempt. We have information from Mr. Kumar
5 that there were three procedures, and also we have
6 videotapes. Since we don't have the video, we haven't
7 viewed the video, we don't know if all of these procedures
8 happened at one time and they're all included in the same
9 video or if ICE is in the same two videos. We do know from
10 the records that were produced in Texas that between these
11 procedures there were pauses to conduct or to take extra
12 pictures and do other kind of other medical examinations
13 that may not have been sealed. We just don't know.

14 THE COURT: The forced feeding occurred in August
15 and early September 2019, is that correct?

16 MS. NOBLE: The feeding in Texas?

17 THE COURT: The forced feeding.

18 MS. NOBLE: May I please check my records? I
19 don't actually know the date off the top of my head.

20 MS. GREENBERGER: I can answer that. That is
21 correct, your Honor.

22 THE COURT: And that took place in an ICE
23 detention center in Texas?

24 MS. GREENBERGER: Correct.
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2 THE COURT: All right, and then these legal
3 proceedings, which also took place in Texas, they took
4 place in what court in Texas?

5 MS. GREENBERGER: The court -- I can answer that.

6 MS. NOBLE: One moment, please. It was a federal
7 district court. I will pull up the file.

8 THE COURT: And the purpose of these legal
9 proceedings -- and this was obviously not a FOIA action --
10 this was a dispute over the legality of and/or the
11 conditions under which the forced feeding occurred -- I'm
12 guessing here?

13 MS. NOBLE: Yes. ICE is required to go to court
14 and get an order to perform these involuntary procedures.

15 THE COURT: And Mr. Kumar had counsel at that time
16 that was not your firm, is that right?

17 MS. NOBLE: Yes.

18 THE COURT: Okay. And I think what you're saying
19 is you think there may have been more than one video
20 because Mr. Kumar indicated that he was videotaped more
21 than once.

22 MS. NOBLE: He indicated that he was videotaped in
23 all three procedures.

24 THE COURT: And those three procedures occurred on
25 different days?

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MS. NOBLE: That, I don't know. I believe they may have been on the same day, but they were separated by trips to the X-ray machine.

THE COURT: Okay. I would have assumed this information was in the records of the Texas proceeding, no?

MS. NOBLE: I will look. I have a copy of a hearing transcript. I don't have all of the medical records; I have some of the medical records.

THE COURT: Okay. And where is Mr. Kumar now?

MS. NOBLE: He was staying with, I believe, a friend. I actually don't have full information about that. I don't want to speak --

THE COURT: All right, so he's no longer detained, is that correct?

MS. NOBLE: Yes. He's been released from detention.

THE COURT: All right, and is he working with the First Look Institute on this FOIA matter, or are you operating independently?

MS. NOBLE: We're operating independently, but we have our reporter (indiscernible). Travis Mannon has spoken with the person he's staying with. And we also have a signed privacy waiver from Mr. Kumar that was witnessed by the same person.

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2 THE COURT: Okay. All right. So let us turn,
3 then, to the matter at hand. Because this is a FOIA case,
4 I will not be issuing a traditional pretrial scheduling
5 order with discovery deadlines and so forth. But I do have
6 some supervisory responsibility, now that the matter is in
7 federal court, over the schedule by which the government
8 proposes to release the one video that the government has
9 agreed to release.

10 So, Ms. Rovner, I am not a videographer nor a
11 software engineer, and I am not familiar with the Freedom
12 Labs software that the government uses, but my common
13 sense, not to mention my considerably younger and more
14 technologically savvy children, tell me that the schedule
15 that the government proposes boggles the mind. Can you
16 explain it to me?

17 MS. ROVNER: Sure, your Honor. So the schedule
18 the government proposes is producing five-minute segments
19 of the 59-minute video per month over 12 months. And
20 that's for a couple of reasons. The first is what the
21 government explained in the letter about issues encountered
22 with processing the video. The most significant -- the
23 government's encountered or ICE FOIA has encountered
24 technical issues since it started processing, including
25 needed to be trained in how to use this Visual Lab software

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THE COURT: Has that now happened? Are the appropriate personnel now trained?

MS. ROVNER: Yes, that has happened. And they also encountered issues importing the video into the software. But they've broken it up into segments and have the video in the software.

THE COURT: What do you mean "importing the video into the software"? I would think that -- correct me if I'm wrong here -- if the purpose of this software is to enable people to edit video, the software has to be capable of allowing the importation of the video to be edited. I mean, isn't that like, I don't know, opening the door to the car and getting into it?

MS. ROVNER: I don't -- I'm not -- I'm also not a technical expert, but I understand that they had issues importing the video into the software. They had to get Visual Lab's help with that. And contrary to what plaintiffs said in their letter, the entire 59-minute video cannot be imported in the software at once; it needed to be broken into smaller segments. I don't know -- because the original proposal was 15-minute segments, I don't know whether a 15-minute segment was small enough to import into the software, but the video has been imported into the

1 software.

2 And then ICE FOIA encountered difficulties. They
3 tried using that automatic redaction tool that plaintiffs
4 pointed out, and --

5 THE COURT: That's the thing which theoretically
6 would blur everybody's faces all at once?

7 MS. ROVNER: Yes. And it didn't work perfectly to
8 do that or didn't even work well to do that. So in a five-
9 minute segment there are 9,000 frames. And ICE FOIA had to
10 go through each of the 9,000 frames and make sure that the
11 blurring was correct. And it often wasn't, which required
12 in each of those 9,000 frames for redactions to be
13 inserted. And it's not just faces; it's also -- there's
14 some ICE e-badges on the officers that have their names
15 that need to be redacted. So ICE FOIA had to add
16 redactions, sometimes remove redactions. But it required
17 review of each of the 9,000 frames, which was a tedious
18 process.

19 They also encountered technical issues, which I
20 assume one would think that they wouldn't encounter with
21 saving the redactions. So it took much longer than
22 anticipated, which is why the government revised its
23 proposal from 15 minutes per month over four months to five
24 minutes per month over 12 months.

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2 So those were the technical issues. There's also
3 resource issues with the volume of FOIA requests that ICE
4 is receiving. They've seen a substantial increase in FOIA
5 requests beginning in 2018. For example, in 2015 they
6 received a little over 44,000 FOIA requests; by 2021,
7 they've received over 106,000 FOIA requests. So from 2017
8 to --

9 THE COURT: Hold one moment, please, Ms. Rovner.
10 Proceed.

11 MS. ROVNER: So from 2017 to 2020, ICE had seen a
12 240% increase in the number of FOIA requests. They're
13 currently processing 5,000 open FOIA requests, which
14 includes a backlog of 4,600 requests. And a backlog means
15 the request has been pending for more than 20 days. ICE
16 FOIA currently has 146 open federal district court cases,
17 with 60 cases in active record production. As far as
18 staffing, there are 18 FOIA specialists processing the
19 requests at the administrative level and four specialists
20 plus one supervisor processing the requests in litigation.

21 And ICE handles the FOIA requests in a first-
22 in/first-out basis to ensure fairness among the requesters
23 and litigants. And most cases involve actually documents
24 and records rather than videos, and for that the normal
25 processing rate is 500 pages per month. I don't know how

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2 that equates to 9,000 frames in a video, but that's the
3 information I have on the processing rate. So ICE has
4 these resource issues and tries to handle them in a fair
5 manner by processing in a first-in/first-out basis.

6 And, if your Honor would allow, I'd like to
7 respond to a couple of points in plaintiffs' letter about
8 what they are suggesting in their reply letter.

9 THE COURT: Let me ask you a couple of questions
10 first, if you don't mind. The five minutes per month that
11 you now propose, which is 9,000 frames, what does that
12 equate to in terms of person hours?

13 MS. ROVNER: That I don't have an exact number. I
14 asked, and it wasn't recorded because there was an amount
15 of time that was spent redacting and then there was
16 additional time spent with all the technical issues. But
17 there is --

18 THE COURT: But that, if I understand it
19 correctly, is past. The startup investment of time, both
20 in getting trained on this Visual Art software and in
21 overcoming whatever the original importation barriers were,
22 you tell me that that's done. The personnel are trained
23 and the video has been imported. So going forward, it's
24 just the marginal time, so to speak, of how many frames can
25 your available technicians get through per hour or per day,

1 as the case may be. That's got to be crucial information
2 because if it turns out that one person can get through
3 9,000 frames, which is what you tell me a five-minute
4 segment is, in three and a half hours, that's one thing.
5 If it takes three technicians all day every day for a
6 month, that's another thing. That's important information.
7

8 MS. ROVNER: So we don't have that for the -- ICE
9 did produce the first segment on November 19th.

10 THE COURT: Okay.

11 MS. ROVNER: And we don't have that information
12 for that month because they encountered so many technical
13 issues, including with saving the redactions they'd done.
14 So they had to go back and redo redactions.

15 THE COURT: Have they now learned how to save
16 their redactions?

17 MS. ROVNER: I'm not sure whether they're still
18 encountering issues with that.

19 THE COURT: Well, presumably, they eventually
20 learned how to save their redactions, because they would
21 have to be saved on the segment that was turned over.

22 MS. ROVNER: Eventually with -- you're correct
23 with that first five-minute video. They encountered
24 issues, so had to redo their work and eventually could save
25 the redactions, and that video was produced on

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November 19th.

THE COURT: All right. And let me ask -- I don't know if it's Ms. Noble or Ms. Greenberger -- you have it? It is satisfactory?

MS. GREENBERGER: We have it. It is one -- you know, I'm concerned to hear that it's been broken up into segments. But it is satisfactory except that we are reserving our right to challenge the exemption. All the faces are blurred, sometimes unnecessarily so, it seems to me. But it is -- it runs, we can watch it, yes.

THE COURT: It runs, you can watch it. It shows Mr. Kumar --

MS. GREENBERGER: Yes.

THE COURT: -- unredacted because he signed a waiver?

MS. GREENBERGER: Correct, your Honor.

THE COURT: And it shows people around him with their faces and their badges blurred, generally speaking?

MS. GREENBERGER: Correct, your Honor.

THE COURT: Okay. All right, so, really, the only question here is the plaintiff says five minutes a month is nonsense, the government says five minutes a month is the best we can do realistically. But the government has not provided me with what I think the most important data is to

1
2 evaluate the government's position. So what should I do,
3 Ms. Greenberger?

4 MS. GREENBERGER: You know, my position, what
5 we've seen from the government is that when there are
6 court-ordered deadlines, then the government meets those
7 deadlines. And part of the reason that this has become so
8 much work is that when we made the simple request, you
9 know, January 2020, they didn't comply with it. We had to
10 come to your Honor, which never should have happened in the
11 first place. And so I think if we set a schedule where
12 they have to produce it in a month or six weeks, they'll
13 meet that schedule and they'll find the resources to do
14 that.

15 THE COURT: Ms. Rovner?

16 MS. ROVNER: Your Honor, as explained in the
17 government's letter, there's -- one of the, I guess, four
18 specialists in the litigation processing unit is assigned
19 to process this video, and she also has a number of other
20 federal court cases which --

21 THE COURT: Involving videos?

22 MS. ROVNER: Involving records. I don't know that
23 they're videos. And she's had to request overtime to even
24 complete all of her work on the case. So I think if the
25 Court issues an order that requires the videos to be

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2 processed more quickly than five minutes per month, I can't
3 say whether that's possible or not possible, but it will
4 require, I guess, this case to kind of jump the line in
5 front of other cases that have been pending for longer.

6 THE COURT: Well, how do I know that, Ms. Rovner?
7 I understand the concept, certainly, but I have not been
8 provided with any information except the overview that
9 you've given me orally this morning. I certainly don't
10 have any evidence as to how many cases are out there and
11 how you have triaged them, which FOIA case came in first,
12 which federal Complaint was filed first, what the volume of
13 these various requests are. And I don't know -- I'm not
14 volunteering for that job, for that job of receiving that
15 information and sorting through to determine whether ICE is
16 sequencing its FOIA requests fairly or unfairly, given
17 limited resources and increasing demands.

18 But I am responsible for making sure that the FOIA
19 request at issue in this case is addressed reasonably
20 promptly. And when I say "reasonably promptly," I mean
21 reasonably promptly pursuant to the significantly
22 diminished expectations that we are all now living with in
23 FOIA cases, which bear very little resemblance to what I
24 think Congress contemplated when it originally passed the
25 statute. But I don't want to degrade the process even

1 further. I have not heard anything this morning that
2 convinces me that five minutes per month is the best that
3 the government can or should be asked to do. That said,
4 this isn't an emergency case in the sense that the world --
5 well, maybe the world is waiting breathlessly for the full
6 59 minutes, but not for any specific goal or deadline that
7 I am aware of. So what I'm inclined to do here is I am
8 inclined to split the baby and make both of you unhappy and
9 require that the original proposal -- and by "original," I
10 mean in October of this year -- was to produce the entire
11 video in four equal segments. And let me see what your
12 time period was for that at the time. Who wants to remind
13 me what the government's time period was?

14
15 MS. GREENBERGER: Your Honor --

16 THE COURT: Ah, November, December, January, and
17 February. The December deadline is coming up. And in the
18 December deadline I think you now contemplate producing
19 just five minutes, is that right?

20 MS. ROVNER: Yes, your Honor, and I've reminded
21 ICE of that deadline. And the last I heard, they're on
22 track to do five minutes by December 20th. I don't know --

23 THE COURT: Five minutes by December 20th?

24 MS. ROVNER: I don't know whether -- I think it
25 would be difficult if your Honor is inclined to have them

1
2 produce 15 minutes, for them to do that by December 20th.

3 THE COURT: It may not be possible. So let's do
4 this. Five minutes by December 20th. And then you only
5 get three months after that. So one-third of the remaining
6 video by January 19th. Let's see if I can do that math in
7 my head. I think that would be 30%. Right? Five percent
8 in November, five percent in December. That gets us up to
9 ten. So 30% January 19th, 30% February 18th, and 30%
10 March -- I don't have my calendar up. Is March the 18th a
11 weekday? March 18th is a Friday. All right, so the final
12 30% on March 18th.

13 And, Ms. Rovner, if the government determines that
14 that is impossible, what we will do is we will have an
15 evidentiary hearing on that point on a convenient date in
16 January, at which you will produce someone from ICE who can
17 provide admissible testimony as to why it's impossible.
18 Hopefully, we won't get to that point, but let me give you
19 a deadline of December 20, which is your deadline for
20 producing the next five minutes, to advise me by letter if
21 the government contends that it cannot then go to the
22 schedule that I outlined for you to produce larger segments
23 in January, February and March. And if I receive that
24 letter on or before December the 20th, then we'll schedule
25 an evidentiary hearing for a not-too-inconvenient date in

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2 January.

3 In the hope that that is not necessary, I think I
4 should also put a status calendar -- a status conference on
5 the calendar for the end of March or the beginning of
6 April, just to check in and see what is going on and if and
7 when there are going to be summary judgment motions or
8 perhaps not. April the 7th, then. Mr. Snell tells me I'm
9 available at ten o'clock in the morning, presumptively here
10 in Courtroom 20A, public health conditions permitting. And
11 I will ask for a joint status update letter one week prior,
12 please.

13 All right, anything further for today,
14 Ms. Greenberger?

15 MS. GREENBERGER: Yes, your Honor. So I just also
16 want to come back to this issue of the segmenting. And so
17 on December 20th are we going to be getting minutes five
18 through ten or minutes zero, one through ten?

19 THE COURT: I don't know.

20 Ms. Rovner?

21 MS. ROVNER: It will be five through ten.

22 THE COURT: All right, so you're going to end up
23 with lots of little, short videos, and you're going to have
24 to put them together yourself, it sounds like.

25 MS. GREENBERGER: Right. And so I think it's

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2 going to be important to us to make sure that there is no
3 frames that get lost, so that we're able to piece them
4 together. And I don't know if the best approach is to try
5 to hammer that out now or for Ms. Rovner and I to try to
6 hammer out a protocol and approach the Court only if
7 there's a dispute on that.

8 THE COURT: Well, I confess that this was a
9 problem I did not envision. I am assuming, but perhaps it
10 would be helpful to say it out loud, Ms. Rovner, that there
11 will be no gaps, that video number two will pick up at the
12 very next frame where video number one left off?

13 MS. ROVNER: Yes, your Honor, I think that's the
14 plan. And each production is accompanied by a production
15 letter. I know plaintiffs mentioned they were concerned
16 about authenticity issues, but each segment will be
17 accompanied by a production letter from ICE saying what
18 segment it is.

19 THE COURT: Okay. So perhaps the best way to
20 leave that, then, is to just make sure that that production
21 letter provides plaintiffs' counsel with the necessary
22 information so that they can assure themselves that there
23 are no gaps in the production.

24 Anything else, Ms. Greenberger?

25 MS. GREENBERGER: No. And I'll consult with our

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client, who's a videographer, about what that necessary
information would be, and I'll get that to Ms. Rovner.

THE COURT: All right, and your individual client,
Mr. Mannon, he understands this software?

MS. GREENBERGER: Correct, yes.

THE COURT: Okay. Anything further, Ms. Rovner?

MS. ROVNER: No, your Honor.

THE COURT: All right. Thank you very much,
counsel.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of First Look Institute, Inc. et al v. U.S. Immigration and Customs Enforcement, Docket #21-cv-07052-BCM, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 21, 2021